

BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFOKNIA

In the Matter of the Appeal of)
A. J. BIMA)

For Appellant: A. J. Bima,
in pro. per.

For Respondent: Terry Collins
Counsel

O P I N I O N

This appeal is made pursuant to section 19057, subdivision (a), of the Revenue and Taxation Code from the action of the Franchise Tax Board in denying the claim of A. J. Bima for refund of personal income tax in the amount of \$1.00 or more for the taxable year 1978.

Appeal of A. J. Bima

The sole issue presented by this appeal is whether the respondent properly imposed a penalty pursuant to section 18683 of the Revenue and Taxation Code for appellant's failure to file his 1978 California personal income tax return after notice and demand.

Appellant failed to file his 1978 California personal income tax return by the due date of April 15, 1979, as required by section 18432 of the Revenue and Taxation Code. On November 26, 1979, respondent mailed written notice to appellant demanding that he file a return within ten days. The notice was addressed to appellant at 1251 Parker Place, San Diego, CA 92109 and was not returned. The notice advised appellant that if his return was not filed within this time period, a penalty of 25 percent of the tax before credits for withholding or other prepayments might be assessed.

When no return was received, respondent issued a notice of proposed assessment assessing a tax of \$2,849.00 and \$1,424.50 in penalties (\$712.25 for failure to file a timely return pursuant to section 18681, and \$712.25 for failure to file a return after notice and demand pursuant to section 18683 of the Revenue and Taxation Code). The notice of proposed assessment was mailed to appellant at his Parker Place address and was not returned. The assessment was based on information then available to respondent. The notice of proposed assessment became final on June 5, 1980. Five months later, on November 6, 1980, appellant filed his 1978 California personal income tax return reflecting a tax liability of \$2,504.00 which was offset by a withholding credit of \$3,255.00. Appellant requested a refund of the \$751.00 excess withholding credit over the tax liability.

Respondent reduced appellant's assessed tax liability to the amount shown on the return, but did not eliminate the demand penalty of 25 percent of the tax liability before withholding. Respondent did, however, reduce the penalty to \$626.00, 25 percent of the \$2,504.00 tax liability shown on appellant's late return. Respondent offset appellant's claimed overpayment of \$751.00 against the \$626.00 penalty assessment and refunded the \$1.25.00 balance. Thereafter, appellant filed a claim for refund which was denied. This appeal followed.

Section 18401 of the Revenue and Taxation Code provides that every individual taxable under the Personal Income Tax Law must file an annual return unless the income of the individual is less than a specified amount.' The

Appeal of A. J. Bima

record on appeal indicates that appellant was required to file a return for 1978. Appellant's return was due on or before April 15, 1979. (Rev. & Tax. Code, § 18432.)

Section 18683 of the Revenue and Taxation Code provides, in pertinent part:

If any taxpayer... fails or refuses to make and file a return required by this part upon notice and demand by the Franchise Tax Board, then, unless the failure is due to reasonable cause and not willful neglect, the Franchise Tax Board may add a penalty of 25 percent of the amount ... of any deficiency tax assessed by the Franchise Tax Board concerning the assessment of which the information or return was required.

Appellant's position seems to be that he has been denied all of the forms, as well as other computer related information, respondent used during the appeal year which appellant contends he needs to analyze the methodology relied on by respondent to update its records and thereby show that respondent's records are in error. We are unable to ascertain the materiality or relevance of this information to the only issue at hand, whether the penalty was properly assessed.

The record on appeal contains no evidence that appellant's failure to respond to the notice and demand was due to reasonable cause and not willful neglect.

It is well settled that the failure of respondent to supply forms does not constitute reasonable cause for failure to file a return. (Cf. Appeal of Escondido Chamber of Commerce, Cal. St. Bd. of Equal., Sept. 17, 1973; Appeal of Normandy Investments, Ltd., Cal. St. Bd. of Equal., Sept. 12, 1968; Rev. & Tax. Code, § 18431.)

Respondent's notice and demand was mailed to appellant's Parker Place address in San Diego, the only address available to respondent. That this was appellant's correct address is indicated by the fact that the same address appeared on appellant's late return. Furthermore, appellant's 1978 and 1979 W-2's were mailed by his employer to the Parker Place address. Thus, appellant is unable to contend that he did not actually or constructively receive respondent's notice and demand. (See Appeal of Thomas T. Crittenden, Cal. St. Bd. of Equal., Oct. 7, 1974.)

Appeal of A. J. Bima

Respondent correctly computed the penalty based upon the amount of tax determined to be due, which in this instance coincided with the tax reported on appellant's delinquent return. Section 18683 provides that the penalty may be computed as 25 percent of the tax deficiency resulting from the taxpayer's failure to file a return. It is well established that in the case of a delinquent return, the deficiency is the correct tax due, rather than the excess of the correct tax over the tax shown on the delinquent return. (See Herbert C. Broyhill, ¶68,025 P-H Memo. T.C. (1968); Appeal of Frank E. and Lilia Z. Hublou, Cal. St. Bd. of Equal., July 26, 1977.) Furthermore, the tax deficiency exists regardless of whether the taxpayer is entitled to a credit for tax withheld from wages. (Rev. & Tax. Code, § 18591.1 subd. (b) (1).) The credit merely operates to reduce or offset the tax liability that is established by the delinquent return.

For the reasons stated, we conclude that:
respondent's action in this matter must be sustained.

Appeal of A. J. Bima

OHD E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 19060 of the Revenue and Taxation Code, that the action of the Franchise Tax Board in denying the claim of A. J. Bima for refund of personal income tax in the amount of \$1.00 or more for the taxable year 1978, be and the same is hereby sustained.

Done at Sacramento, California, this 17th day of August, 1982, by the State Board of Equalization, with Board Members Mr. Bennett, Mr. Collis, Mr. Dronenburg, and Mr. Nevins present.

William M. Bennett , Chairman

Ernest J. Dronenburg, Jr. , Member

Richard Nevins, Member

_____, Member

_____, Member